IN THE

Supreme Court of the United States

No. 486 OCTOBER TERM, 1967

J. DAVID STERN,
Petitioner

v.

SOUTH CHESTER TUBE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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South Chester Tube Company,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, 252 F. Supp. 329, is printed in the Appendix at page 11a. The opinions of the court of appeals, 378 F.2d 205, are printed in the Appendix at page 19a.

JURISDICTION

The judgment of the court of appeals affirming the dismissal by the district court of petitioner's complaint was entered on May 25, 1967. The petition for certiorari was filed on August 14, 1967 and granted on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The case involves the construction of the All Writs Act, now codified as 28 U.S.C. § 1651(a) (1964):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The All Writs Act as originally enacted, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), provided:

> "That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Relevant to the interpretation of the All Writs Act is the section added to the Judicial Code by Public

Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964):

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Federal Rules of Civil Procedure provide in Rule 81(b):

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

QUESTION PRESENTED

Should this Court now overrule a uniform line of decisions extending from 1821 and repeatedly left unchanged by Congress, most recently in 1962, which required the courts below in the instant case to hold that a limitation in the language of the All Writs Act deprives the federal district courts of jurisdiction to grant relief in the nature of mandamus against a private defendant when such an order is the only relief which the plaintiff seeks?

STATEMENT

Petitioner, the plaintiff below, seeks reversal of the judgment of the court of appeals affirming an

order of the district court dismissing his civil action in which jurisdiction was grounded on diversity of citizenship (A. 3a). Petitioner's sole request for relief was for an order to compel inspection of the records of the respondent, a private corporation organized under Pennsylvania law with its principal place of business in Pennsylvania and in which plaintiff, a citizen of New York, owns 62 of the 20,000 outstanding shares.*

Respondent corporation filed an answer on the merits to petitioner's complaint, pleading, among other defenses, that petitioner's demand for inspection was not made in good faith and that the district court lacked jurisdiction of the subject matter (A. 6a).

The district court granted respondent's motion to dismiss (A. 10a) on the ground that the court lacked jurisdiction to issue an order in the nature of a writ of mandamus when such an order is the only relief sought by the plaintiff (A. 11a). No decision was rendered with respect to respondent's second jurisdictional defense concerning the absence of the jurisdictional amount (A. 4a).

The court of appeals affirmed the dismissal by the district court, with one judge dissenting (A. 19a, 22a).

* A second shareholder, who was a citizen of Pennsylvania, was allowed to intervene prior to dismissal of the complaint; subsequently the court of appeals granted the motion of that plaintiff, consented to by respondent, to withdraw from the litigation in order to retain diversity jurisdiction.

SUMMARY OF ARGUMENT

I. The only relief sought by the petitioner in the district court was an order to compel inspection of the corporate records of the defendant, a Pennsylvania corporation. Under both the general common law and the law of Pennsylvania, such relief constitutes an order in the nature of a writ of mandamus.

The All Writs Act, Section 14 of the Judiciary Act of 1789, created jurisdiction in the district courts to issue writs of mandamus when "necessary for the exercise of their respective jurisdictions," but not when the writ itself was the only relief sought. *M'Clung* v. *Silliman,* 6 Wheat. 598. The limitation reflects the Congressional intention in 1789 to place narrow limits upon the jurisdiction of the lower federal courts, particularly the jurisdiction to issue writs. The gradual expansion by statute of the general diversity and federal question jurisdiction has not removed the limitation on mandamus because the original limiting language of the All Writs Act remains unchanged.

II. Congress has repeatedly recognized the limitation on mandamus and has enacted statutes to create district court jurisdiction to issue writs of mandamus in narrowly defined classes of cases, but has never created a general jurisdiction in mandamus by amending the relevant language of the All Writs Act. The Interstate Commerce Act, for example, contains several sections, each enacted at a different time, to create

mandamus jurisdiction to enforce specific portions of the Act, but Congress has not created mandamus jurisdiction to enforce the Act generally.

In 1962, Congress for the first time created a general jurisdiction in original mandamus in the district courts, but limited the jurisdiction to cases involving relief against federal officers and agencies. The legislative history of the 1962 statute establishes that the absence of district court jurisdiction in mandamus was brought to the attention of both houses in three identical committee reports, one of which was reprinted in the Congressional Record.

III. The change in the interpretation of the Rules of Decision Act announced in *Erie R.R.* v. *Tomkins,* 304 U.S. 64, does not create jurisdiction in the district courts to issue all writs within the jurisdiction of state courts, because the federal limitation arises from the All Writs Act and from the plenary power of Congress to limit the jurisdiction of district courts. That power was not affected by the *Erie* decision, *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 105-06, as indeed it should not have been, since the limitation on mandamus jurisdiction creates none of the evils which the *Erie* decision sought to reverse, including especially the evil of producing a result on the merits in the federal court which might be different from the result on the merits obtainable in a state court.

ARGUMENT.

I. The federal decisions uniformly and correctly hold that the All Writs Act does not allow a district court to issue an order in the nature of mandamus in a diversity case against a private defendant when that order is the only relief which the plaintiff seeks.

Petitioner cites no decisions at any level which are in conflict with the decision of the court of appeals because no such decisions exist.

Petitioner himself concedes the initial question as to the nature of the relief which he sought in the district court. Both opinions of the court of appeals, 378 F.2d at 206, 207-08 (Appendix 20a, 23a, 24a-25a), the opinion of the district court, 252 F. Supp. at 331 (Appendix 14a), and the petitioner (Brief 8; Petition 7-8) agree that the relief sought in the instant case is relief in the nature of an original writ of mandamus, regardless of whether the test of the nature of the remedy should be found in the general common law, *Rosen* v. *Alleghany Corp.*, 133 F. Supp. 858, 865 (S.D.N.Y. 1955), or the law of the state having jurisdiction over the corporation. *Newark Morning Ledger Co.* v. *Republican Co.*, 188 F. Supp. 813, 814 (D. Mass. 1960). As the district court correctly held, 252 F. Supp. at 331:

> "the question here is moot since both the Pennsylvania and the general common law remedy to compel the inspection of corporate records is mandamus."

The decisions have uniformly recognized that the United States District Courts lack jurisdiction of cases in which mandamus is the only relief sought by the plaintiff, absent a specific federal statute conferring such jurisdiction. This jurisdictional limitation arises from the language of the All Writs Act, Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1845), which provided:

> "That all the before-mentioned courts . . . shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. —*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."* (Emphasis added.)

This Court held that an original action for mandamus does not create such necessity, since the writ would be necessary

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* As now codified, 28 U.S.C. § 1651(a) (1964), the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

"Not because that Court possesses jurisdiction, but because it does not possess it. . . .

"The 14th section of the [Judiciary] act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued out." *M'Clung* v. *Silliman,* 6 Wheat. 598, 601-02.

The validity of the decision in *M'Clung* v. *Silliman* is demonstrated by an analysis of the language of the original Judiciary Act. If the words "which may be necessary for the exercise of their respective jurisdictions" did not constitute a limitation on the jurisdiction to issue writs created in the first sentence of the section, including specifically the writ of habeas corpus, there would seem to be no need for the second sentence creating a specific power to grant writs of habeas corpus in a limited class of cases.

The statutory basis of the *M'Clung* decision appears even more clearly when the language of the adjoining Section 13 of the Judiciary Act, 1 Stat. 81, is contrasted with the language of Section 14. Section 13 is the original provision with respect to the jurisdiction of the Supreme Court which was considered in *Marbury* v. *Madison,* 1 Cranch 137. The original Section 13 provided:

"The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after

> specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*" (Emphasis added.)

The words "which may be necessary for the exercise of their respective jurisdictions" do not appear in Section 13, although both sections use the phrase "principles and usages of law." Read together, these sections show an intent by the Congress to allow the Supreme Court to issue the original writ of mandamus, but only in a limited class of cases, while permitting the lower courts to issue the writ of mandamus only when jurisdiction is otherwise acquired, although both the Supreme Court and the lower courts could issue an original writ of habeas corpus in a limited class of cases.

The reasons for these various limitations can readily be inferred from the legislative history of the Judiciary Act, as described by Charles Warren in his definitive article, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49 (1923):

> "The fact is that the final form of the Act and its subsequent history cannot be properly understood, unless it is realized that it was a compromise measure, so framed as to secure the votes

> of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction." 37 Harv. L. Rev. at 53.

Although the original drafts of the bill, Senate 1, which ultimately became the Judiciary Act, were expected to create a broad lower court jurisdiction, 37 Harv. L. Rev. at 60-62, the bill as reported from committee was much more narrow, apparently so that the principal draftsman, Oliver Ellsworth, could obtain "the concurrence of Richard Henry Lee in reporting the Bill." 37 Harv. L. Rev. at 62. Lee "was probably picked for that duty for tactical, political reasons, in order to strengthen the measure with the anti-Federal faction." 37 Harv. L. Rev. at 63. Warren comments with respect to Senate 1 that:

> "Evidently, at some stage in the drafting of the Bill, a contest had been waged between those men who wished to confine the Federal judicial power within narrow limits and to leave to the State Courts the chief part of original jurisdiction, and those men who wished to vest in the Federal Courts the full judicial power which the Constitution granted. . . . The former faction prevailed. . . ." 37 Harv. L. Rev. at 62.

However, the original language of Section 14 of the bill (also Section 14 of the Act), even in the narrow form drafted by Ellsworth and reported by Lee, was too broad for the Senate. The express power to issue a writ of "subpoena and protection for wit-

nesses" was stricken out after the word "scire facias." 37 Harv. L. Rev. at 95. Since the writ of protection, allowing a witness to be immune from state civil and criminal process, see, *e.g., Chanler* v. *Sherman,* 162 Fed. 19 (2d Cir. 1908), might intefere with the operation of the state courts, the amendment to Section 14 was entirely consistent with the other limitations intended to narrow the occasions for the issuance of writs.

This Court's decision in *M'Clung* v. *Silliman,* when placed in the context of the legislative history described by Warren, is plainly in full accord with the intentions of the Congress which passed the original All Writs Act.

Since the *M'Clung* decision in 1821, the law has been "well established that a United States district court, outside of the District of Columbia, does not have jurisdiction to issue the writ of mandamus." *United States ex rel. Barmore* v. *Miles,* 177 F. Supp. 172, 173 (W. D. Mich. 1959). The courts of the District of Columbia, having all the common law powers of courts of general jurisdiction of the State of Maryland as of 1801, are unique in having the power to issue an original mandamus. *Kendall* v. *United States,* 12 Pet. 524, 622-25.

The limitation upon the mandamus jurisdiction does not depend upon whether an original action in mandamus is or is not a "civil action."

Certain language in earlier decisions might seem to place significance on the special nature of manda-

mus, but that classification has never been central to the existence of the limitation.

In *M'Intire* v. *Wood,* 7 Cranch 504, the brief opinion of the Court by Mr. Justice Johnson may be read to imply that an expansion of the circuit court jurisdiction provided by Section 11 of the Judiciary Act of 1789, 1 Stat. 78, might result in an expansion of the mandamus jurisdiction. That interpretation is, however, foreclosed by the decision in *M'Clung* v. *Silliman,* 6 Wheat. 598, involving the same claim litigated in *M'Intire* v. *Wood.* The *M'Clung* case, however, involved parties who were citizens of different states and therefore "competent parties in the circuit court" under the existing diversity jurisdiction. 6 Wheat. at 600. The Court deciding *M'Clung,* in an opinion also written by Mr. Justice Johnson, declined to hold that there was any difference required by the different ground on which jurisdiction was based and held that in both cases the decisive element was "that the Circuit Court did not possess the power to issue the mandamus moved for." 6 Wheat. at 601. The limitation, as declared in *M'Clung* v. *Silliman,* depends upon the language of the All Writs Act, and not upon the language of the general jurisdictional statutes. Changes in the language of those jurisdictional statutes, from the original Judiciary Act of 1789 to the present Judicial Code of 1948, do not change the limitation.

This Court has adhered to the rule through successive changes in the wording of the original Judiciary Act. In *Rosenbaum* v. *Bauer,* 120 U.S. 450, the Court

considered the effect of Sections 1 and 2 of the Act of March 3, 1875, 18 Stat. 470, which created a general federal question jurisdiction, and held that prior decisions, including *M'Clung* v. *Silliman,* 6 Wheat. 598, were still binding. In *Knapp* v. *Lake S. & M.S. Ry.,* 197 U.S. 536, the Court rejected an argument that a change in the doctrine was required either by changes in the language of the jurisdictional statutes or "in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby." 197 U.S. at 541. Since both the adoption in 1937 of Fed. R. Civ. P. 81(b) and the 1948 revision of the Judicial Code, "the courts have adhered to the view that Congress has not vested in the district courts original jurisdiction in cases of mandamus, without any suggestion that the revised jurisdictional phraseology wrought any change." *Marshall* v. *Crotty,* 185 F.2d 622, 627 (1st Cir. 1950).

The absence of jurisdiction in a United States District Court to issue an order to compel inspection of corporate records has been recognized in all diversity actions involving facts similar to those of the instant case. *Newark Morning Ledger Co.* v. *Republican Co.,* 188 F. Supp. 813, 814 (D. Mass. 1960); *Selman* v. *Colborn,* 143 F. Supp. 112, 113 (S.D.N.Y. 1956); *Rosen* v. *Alleghany Corp.,* 133 F. Supp. 858, 864-65 (S.D.N.Y. 1955); *Breswick & Co.* v. *Briggs,* 136 F. Supp. 301, 303-304 (S.D.N.Y. 1955).

In each of those cases, the plaintiff sought an order to compel inspection of corporate records of the

defendant. In each case, the court determined that the order requested was in the nature of a writ of mandamus. In each case the court then denied relief on the ground that a United States District Court lacked jurisdiction to issue an order. *Accord, Greenough* v. *Independence Lead Mines Co.,* 45 F.2d 659, 660 (D. Idaho 1930) (alternative holding).

Furthermore, this Court and the courts of appeals have consistently held that the limitation cannot be avoided through the use of an injunction in lieu of a writ of mandamus. A district court could not "make a writ of injunction serve the purpose of a writ of mandamus. . . . What the court was without the power to do directly, it was without the power to do indirectly." *Fineran* v. *Bailey,* 2 F.2d 363 (5th Cir. 1924). The limitation on the issuance of mandamus "is one of substance, and not merely of form." *Smith* v. *Bourbon County,* 127 U.S. 105, 112.

II. Congress has repeatedly recognized and confirmed the statutory limitation on district court jurisdiction in mandamus, most recently in 1962 when both Houses explicitly referred to the rule but Congress created new jurisdiction only with respect to relief against federal officials.

Congress has long recognized and acquiesced in the consistent judicial interpretation since 1821 of the All Writs Act to exclude district court jurisdiction of original actions in the nature of mandamus.

Congress has repeatedly reenacted Section 14 of the original Judiciary Act, with various changes in phraseology and some changes in substance, but without creating original jurisdiction in mandamus. Compare the original section, 1 Stat. 81-82 (*supra* at p. 2), with Rev. Stat. § 716 (1875), and 36 Stat. 1162 (1911), and the present 28 U.S.C. § 1651(a); see Reviser's Note to 28 U.S.C. § 1651 (1964). These reenactments bring the All Writs Act squarely within the class of statutes which Congress has reenacted without amending a particular section previously construed by the courts, thus requiring the courts to "assume that it [Congress] has been satisfied with, *and adopted,* the construction given to its enactment by the courts." *Electric Storage Battery Co.* v. *Shimadzu,* 307 U.S. 5, 14. (Emphasis added.)

Nor can there be any argument that Congress was not aware of the limitation. When Congress has desired that original mandamus be available to litigants, Congress has specifically so provided by creating district court "jurisdiction" to issue the writ of mandamus. But no general jurisdictional statute of this type was enacted until 1962. Instead, the successive grants of jurisdiction to the district courts have been narrowly framed to deal with specific rights and specific classes of cases.

For example, no general mandamus jurisdiction has been created with respect to rights and obligations under the Interstate Commerce Act. Instead, Congress has at various times provided that the "district courts

of the United States shall have jurisdiction . . . to issue a writ or writs of mandamus" to enforce various parts of the Act. Compare the following sections of the Interstate Commerce Act: (1) 25 Stat. 855, 862 (1889), as amended, 56 Stat. 301 (1942), 49 U.S.C. § 23 (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to command carriers to provide equal facilities to shippers; (2) 34 Stat. 584, 594-95 (1906), as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" to enforce "this chapter" of the Act;* and (3) 37 Stat. 701, 703 (1913), as amended, 41 Stat. 493 (1920), 49 U.S.C. § 19a(*l*) (1964), creating district court "jurisdiction . . . to issue a writ or writs of mandamus" commanding compliance "with the provisions of this section."

The 1906 amendment, 34 Stat. 584, 594-95, as amended, 49 Stat. 543 (1935), 49 U.S.C. § 20(9) (1964), is typical of the creation of district court jurisdiction in mandamus in specific classes of cases. In *Knapp* v. *Lake S. & M.S. Ry.*, 197 U.S. 536, this Court had construed Section 6 of the Interstate Commerce Act, creating jurisdiction in mandamus to enforce the filing by a common carrier of its tariffs. The Court had held that Section 6 did not confer

* The words "said Act" in 34 Stat. 594-95 were changed to "this part" by 49 Stat. 543; the editors of the United States Code have "translated" the words "this part" to read "this chapter." See Historical Note to 49 U.S.C.A. § 20, par. (9) (1951).

jurisdiction in mandamus to enforce compliance with Section 20, which provides that the Commission may require annual reports from carriers. Following the decision in the *Knapp* case in 1905, Congress amended the Act in 1906, creating in the district courts jurisdiction to enforce the requirements of Section 20. The Congress did not, however, create jurisdiction in mandamus to enforce the entire Interstate Commerce Act, much less a general jurisdiction in mandamus.

Furthermore, Congress as recently as 1962 has specifically considered the rule laid down in the prior decisions and has determined to amend the Judiciary Act only with respect to jurisdiction in mandamus against federal officers and agencies. Congress recognized that the limitation of mandamus jurisdiction to the district courts of the District of Columbia acted as an inconvenience to private litigants seeking relief against actions of the federal Government. By Public Law 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964), Congress provided that:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Under this section, orders in the nature of mandamus may be granted against officers of the United States by any district court. If Congress had intended to create a general jurisdiction in original mandamus,

Congress could easily have done so merely by providing that "the district courts shall have original jurisdiction of any action in the nature of mandamus."

There can be no doubt that the Congress in 1962 intended to continue the existing limitation, since that limitation was specifically brought to the attention of both Houses prior to the enactment of the amendment. The report of the House Judiciary Committee, H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961), to accompany H.R. 1960, which became Public Law 87-748, stated at page 2:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus. Nor has the abolition of mandamus by rule 81(b) of the Federal Rules of Civil Procedure altered this jurisdictional limitation, since the Federal rules did not change either the substance of the relief which the district courts could grant or the cases over which they had jurisdiction.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia."

Identical language appears in H.R. Rep. No. 1936, 86th Cong., 2d Sess. 2 (1960), which accompanied H.R. 12622. That bill, identical with H.R. 1960 as it passed the House in the 87th Congress, passed the House near the end of the second session of the 86th Congress on August 30, 1960, 106 Cong. Rec. 18405, but was never acted upon by the Senate.

Senate Report No. 1992, 87th Cong., 2d Sess. 2 (1962), to accompany H.R. 1960, contains language substantially identical with the two earlier House Reports:

> "unless jurisdiction is otherwise acquired, the U.S. district courts have long disclaimed jurisdiction to hear petitions for mandamus.
>
> "The single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of Columbia. This court, in addition to being a Federal court, is also charged with the enforcement of domestic law. Its jurisdiction is derived not only from title 28 but also from the laws of the State of Maryland, which governed the area ceded to the District of Columbia in 1801. That body of law included jurisdiction to issue writs of mandamus in original proceedings."

When H.R. 1960 was passed by the Senate, with amendments, on September 6, 1962, Senator Mansfield received unanimous consent, "to have printed in the RECORD an excerpt from the report (No. 1992), explaining the purposes of the bill." The excerpt as printed includes the language quoted above. 108 Cong. Rec. at 18783.

The statement that "the single exception to the general proposition that the U.S. district courts do not have jurisdiction over original actions for mandamus is the U.S. District Court for the District of

Columbia," thus appeared in at least three Congressional committee reports and was printed once in the Congressional Record.

The long and consistent legislative history of specific enactments to create district court jurisdiction in mandamus, culminating in the 1962 Amendment to the Judicial Code, establishes that the limitation on mandamus contained in the original Judiciary Act has been continued by Congress. Under these circumstances, that jurisdiction should not be expanded except by statute, enacted after appropriate consultation and deliberation by both the Judicial Conference, pursuant to the mandate of 28 U.S.C. § 331 (1964), and the responsible Congressional committees.

III. The remedies available in the district courts to litigants in diversity cases continue to be subject to the plenary power of Congress to limit the district court jurisdiction.

Petitioner and the dissenting judge in the court of appeals suggest that the decisions in *Erie R.R.* v. *Tompkins,* 304 U.S. 64, and *Guaranty Trust Co.* v. *York,* 326 U.S. 99, require that a federal court in a diversity case grant the same remedies which would be available in a state court, even if the federal court would otherwise have no power to do so.

That suggestion is not supported by the language of *Guaranty Trust Co.* v. *York.* Mr. Justice Frankfurter there stated for the Court:

> "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts." 326 U.S. at 106. (Footnote omitted.)

With respect to equitable relief, Mr. Justice Frankfurter noted that:

> "In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law.
>
> "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions. . . ." 326 U.S. at 105.

In describing those restrictions, Mr. Justice Frankfurter noted that "explicit Congressional curtailment of equity powers must be respected, see, *e.g.*, Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*" 326 U.S. at 105.

Nor is petitioner's suggestion supported by the reasoning of the *Erie* decision.

Looking first to the statutory basis of the *Erie* doctrine, 304 U.S. at 71-77, *M'Clung* v. *Silliman*, 6 Wheat. 598, was decided long before *Swift* v. *Tyson*,

16 Pet. 1, and does not depend upon any particular interpretation of the Rules of Decision Act. As originally enacted, section 34 of the Judiciary Act of 1789, 1 Stat. 92 (1845), the Rules of Decision Act provided:

> "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."*

Even if the general language of the Rules of Decision Act would make state remedies available to the federal courts determining diversity cases, the qualifying language, "except where the Constitution, treaties or statutes of the United States otherwise require or provide," gives effect to the limitations of the All Writs Act, since that Act, together with other portions of the Judicial Code, does so provide.

Nor does the constitutional ground of the *Erie* decision, 304 U.S. at 77-80, require the adoption by the federal district courts of state standards with respect to remedies in the nature of mandamus. The vice described by Mr. Justice Brandeis in the *Erie* opinion was the use of a federal general common law to achieve

* As now codified, 28 U.S.C. § 1652 (1964), the Rules of Decision Act states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

a substantive result on the merits which would be different from the result obtainable in a state court. 304 U.S. at 74-78. In the instant case the district court has dismissed for lack of jurisdiction over the subject matter, leaving plaintiff free to pursue his remedies in the state courts. The lack of original jurisdiction in mandamus does not change the result on the merits, as in *Swift* v. *Tyson,* nor does the lack of original jurisdiction in mandamus produce a result similar to that in *Guffey* v. *Smith,* 237 U.S. 101, in which the federal remedy in equity was held to extend to a case in which the state courts would have withheld equitable relief.

On the other hand, a holding that the federal courts must entertain diversity cases in which mandamus is the only relief sought, despite the Congressional intention to the contrary, would directly contradict prior decisions concerning the plenary power of Congress over the jurisdiction of the courts.

This Court has consistently held, as in *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234, that:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or *restrict* such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." (Emphasis added.)

In *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R.R.,* 321 U.S. 50, the Court held that the railroad

had not sufficiently performed all prerequisites to relief under the Norris-LaGuardia Act, 47 Stat. 70, and was therefore barred from obtaining injunctive relief in the federal courts. The Court noted that other remedies were available and held that the railroad's failure to observe the requirements of Section 8 of the Norris-LaGuardia Act had

> "deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts,[21] has seen fit to withhold. With the wisdom of that action we have no concern." 321 U.S. at 63-64.

Footnote 21 in the *Toledo* decision cites *Lockerty* v. *Phillips,* 319 U.S. 182, in which the Court construed the provisions of the Emergency Price Control Act, 56 Stat. 23. Section 204(d) of the Act created equity jurisdiction to restrain the enforcement of price control orders under the Act in the Emergency Court of Appeals and in the Supreme Court upon review of decisions of the Emergency Court, and withdrew that jurisdiction from every other federal and state court. In discussing this limitation, Mr. Chief Justice Stone for a unanimous Court compared the limitation on equity jurisdiction thus created with the limitation on jurisdiction in original mandamus first recognized in *M'Intire* v. *Wood,* 7 Cranch 504, 506:

> "There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal

courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234, and cases cited; *McIntire* v. *Wood,* 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' *Cary* v. *Curtis,* 3 How. 236, 245;. . . ." 319 U.S. at 187. (Remaining citations omitted.)

All these limitations on jurisdiction result from the same basic Congressional power over the jurisdiction of the lower federal courts. The limitations in the Norris-LaGuardia Act and in the Emergency Price Control Act result from identifiable Congressional policies and are perhaps more easily understood than the Congressional refusal to create a general district court jurisdiction in original mandamus. But that Congressional refusal is as plain as the explicit declarations of policy in the other statutes which also expressly limit jurisdiction and the result should be the same.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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